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Success Projection Sdn Bhd v RHB Insurance Bhd

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HIGH COURT (KUCHING) — SUIT NO KCH-22–236/12 OF 2012
RHODZARIAH BUJANG J
12 JUNE 2015

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Insurance — Indemnity — Claim for — Insured part subcontractor for logging activities — Riot by villagers caused bulldozer to be torched — Bulldozer insured and under hire-purchase — Whether insurer could indemnify insured party against losses or damages — Whether bulldozer damaged by during riot — Whether damage/loss to bulldozer fell within exception clause of policy — Whether insured party entitled to claim full insured sum or damages

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A group of villagers who were aggrieved by the logging activities carried out by the plaintiff went on a riot and a rampage which saw the torching of the plaintiff's workers' camp as well as their heavy machineries such as a bulldozer which was insured with the defendant and which insurance policy was in force at the material date. The said bulldozer was also under hire-purchase agreement with RHB Bank Bhd at that material time. Evidence of both a police officer and the reporter of a local daily, *Utusan Borneo* who were both present on the day of the riot confirmed that the villagers were armed and aggressive. The plaintiff said there was no clear evidence that the bulldozer was damaged by the rioting villagers but the defendant said it was. In filing their claim, the plaintiff relied on a clause under the heading 'Standard Coverage' in the policy which provides that the defendant shall indemnify the plaintiff 'against loss or damage to the Equipment' by 'fire external explosion self ignition or lighting'. The plaintiff gave a quotation of RM947,576.33 to repair the vehicle. The issues that arose for determination were whether the bulldozer was damaged by the villagers during the protest; whether the damage/loss to the bulldozer fell within the exception clause of the policy; whether the plaintiff was entitled to claim the full insured sum of RM798,895 or alternatively RM730,000 or alternatively damages.

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Held, dismissing the claim with costs of RM40,000:

(1) The protest of the villagers came neatly within the definitions of both civil commotion and riot. The aftermath of their disgruntled acts were burnt guard home, heavy machineries and/or vehicles and the workers' quarters. In all probability, the torching of the bulldozer was by the same rioting villagers and not some unknown persons. The torching of the bulldozer by the villagers was even beyond reasonable doubt – not just a balance of probability, because it showed that the bulldozer was at the

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scene of the riot on the very day when the villagers went on a rampage and torched the guard house, the workers' camp and other vehicles of the company (see paras 15–16).

(2) There is no issue of the plaintiff being entitled to the quantum of damages, be it RM798,895 or alternatively, RM730,000 claimed by them. The former figure was the total hire-purchase price for the bulldozer and the latter was its insured sum. The plaintiff was not entitled as of right to be paid the insured sum, much less the hire-purchase price. Restitution by way of reimbursement of the hire-purchase instalments was also out of the question because the policy clearly provided that the defendant 'shall not be liable for any consequential loss or legal liability whatsoever' (see paras 20 & 22).

[Bahasa Malaysia summary

Sekumpulan penduduk kampung yang tidak puas hati dengan aktiviti penebangan kayu balak yang dijalankan oleh plaintif telah merusuh dan mengamuk yang melihat kepada pembakaran kem pekerja plaintif dan juga jentera berat mereka seperti jentolak yang telah diinsuranskan dengan defendan dan yang mana polisi insurans berkuat kuasa pada tarikh material. Jentolak juga di bawah perjanjian sewa beli dengan RHB Bank Bhd pada masa material. Keterangan kedua-dua pegawai polis dan wartawan surat khabar harian, *Utusan Borneo* yang hadir pada hari rusuhan mengesahkan bahawa penduduk-penduduk bersenjata dan agresif. Plaintif menyatakan tidak terdapat keterangan jelas bahawa jentolak telah rosak akibat penduduk-penduduk yang mengamuk tetapi defendan menyatakan ya. Dalam memfailkan tuntutan mereka, plaintif bergantung ke atas klausa di bawah tajuk 'Standard Coverage' dalam polisi yang nmemperuntukkan bahawa defendan akan membayar plaintif 'against loss or damage to the Equipment' oleh 'fire external explosion self ignition or lighting'. Plaintif memberi sebut harga sebanyak RM947,576.33 untuk membaiki kenderaan. Isu-isu yang berbangkit untuk penentuan adalah sama ada jentolak telah dirosakkan oleh penduduk-penduduk semasa bantahan; sama ada ganti rugi/kerugian kepada jentolak terangkum dalam klausa pengecualian polisi; sama ada plaintif berhak untuk menuntut jumlah yang diinsuranskan sepenuhnya sebanyak RM798,895 atau secara alternatif sebanyak RM730,000 atau secara alternatif ganti rugi.

Diputuskan, menolak tuntutan dengan kos sebanyak RM40,000:

(1) Bantahan penduduk-penduduk terangkum dalam definisi kedua-dua kekecohan awam dan rusuhan. Akibat tindakan bersungut mereka rumah pengawal, jentera berat dan/atau kenderaan dan kuarters pekerja-pekerja yang terbakar. Dalam kesemua kemungkinan, pembakaran jentolak adalah oleh penduduk-penduduk kampung yang sama yang merusuh dan bukan orang-orang yang tidak dikenali.

Pembakaran jentolak oleh penduduk-penduduk kampung melampaui keraguan munasabah – bukan semata-mata imbangan kebarangkalian, kerana ia menunjukkan bahawa jentolak tersebut ada di tempat kejadian rusuhan pada hari tersebut apabila penduduk-penduduk kampung mengamuk dan membakar rumah pengawal, kem pekerja-pekerja dan kenderaan lain syarikat (lihat perenggan 15–16).

(2) Tidak terdapat isu plaintif berhak kepada kuantum ganti rugi, sama ada ia adalah RM798,895 atau secara alternatif, RM730,000 yang dituntut oleh mereka. Jumlah sebelumnya adalah jumlah harga sewa beli untuk jentolak dan harga kemudiannya adalah jumlah yang dinsuranskan. Plaintif tidak berhak sebagai hak untuk dibayar jumlah yang dinsuranskan, lebih kurang harga sewa beli tersebut. Restitusi melalui pembayaran semula bayaran ansuran sewa beli juga tidak boleh dipertimbangkan kerana polisi jelas memperuntukkan bahawa defendan 'shall not be liable for any consequential loss or legal liability whatsoever' (lihat perenggan 20 & 22).]

Cases referred to

Amanah Raya Bhd (suing as administrator of estate of Devia Nathan s/o Savarimuthu, deceased) v Jerneh Insurance Bhd (formerly known as Jerneh Insurance Corp Sdn Bhd) [2005] 4 MLJ 1; [2005] 2 CLJ 393, CA (refd)
Guan Teck Sdn Bhd v Haji Noor bin Haji Yakob & Ors [2000] 4 MLJ 433, CA (refd)
Langdale v Mason (1780) 2 Park's Marine Insce 8th ed 965 (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Siew Yoke Keong v PP [2013] 3 MLJ 630, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)
Penal Code ss 141, 146, 148

Frankie Tieh (Ling & Wong Advocates) for the plaintiff.
Desmond Sahathevan (Battenberg & Talma) for the defendant.

Rhodzariah Bujang J:

[1] This is not a native customary right claim, a staple of the High Courts in Sarawak but an insurance claim. However, it is deeply intertwined with claims of customary rights by villagers in a small town called Tebedu, aggrieved by the logging activities of the plaintiff company, a subcontractor for another company, Alliance Bahagia Sdn Bhd who owned the logging rights from Yayasan Sarawak on land on which the villagers have asserted their said rights. However, their claims of native customary rights over parts of the said land

have fallen on the deaf ears of the relevant authorities. The long and short of it is that on 8 May 2011 they took matters into their own hands, went on a protest and a rampage which saw the torching of the workers, camp of the plaintiff as well as their heavy machineries used for the logging activities such as a Komatsu D85ESS-2 bulldozer which was insured with the defendant and which insurance policy was in force at the material date. The said bulldozer was also under hire-purchase agreement with RHB Bank Bhd at that material time. It looks like an open and shut case but both sides contended otherwise. The plaintiff said there is no clear evidence that the bulldozer was damaged by the rioting villagers. The defendant said it was and the cause of that damage comes neatly under exception 8(11) of the insurance policy which provides as follows:

> The Company shall not be liable for any loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with *mutiny, strike, riot, civil commotion*, military or popular rising, insurrection, rebellion, revolution military or usurped power.
>
> Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise which are occasioned by or through or in consequence, directly or indirectly, of any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance, except to the extent that the insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions. (Emphasis added.)

[2] In filing their claim, the plaintiff relied on a clause under the heading 'Standard Coverage' in the policy which provides that the defendant shall indemnify the plaintiff 'against loss or damage to the Equipment' by 'fire external explosion self ignition or lighting'. That the bulldozer was damaged by fire is not even an issue at the trial. Photographic evidence of the same were tendered at the trial which I will mention in greater details later and the plaintiff had called one Mohamad Zulhisan bin Mohamad Marzuki (PW2) who gave a quotation of RM947,576.33 (p 70, exh P3 which is the plaintiff's bundle of document agreed as to authenticity at the trial) to repair the vehicle. The vehicle was taken to the plaintiff's premises at its office in Pending Kuching where Mr Kent Teo, (DW1) a loss adjuster for Mclaren Saksama (Malaysia) Sdn Bhd MSM International confirmed the damage, not the repair cost. He also testified that the wheels of the bulldozer had been stolen; the reason being these were not damaged by the fire. Obviously, some unknown opportunistic person(s) had stolen the same after the bulldozer was damaged by fire. Mr Kent Teo further agreed that theft comes within cl 1(c) of the policy. However, since the plaintiff did not pursue an alternative claim for just the loss of the wheels, that loss is a non-issue for me in this judgment.

[3] At the trial three issues were agreed for my determination and they are:

(i) whether the bulldozer was damaged by the villagers during the protest in Tebedu;

(ii) whether the damage/loss to the bulldozer falls within the said exception cl No 8(ii) of the policy; and

(iii) only if issue (i) and (ii) are answered in the positive, whether the plaintiff is entitled to claim the full insured sum of RM798,895 or alternatively RM730,000 or alternatively damages.

THE PROTEST

[4] I note that the word 'protest' was used by the defendant themselves in paragraph 8 of their statement of defence but I would prefer to call it a riot for a protest connotes a more peaceful voicing of displeasure or disagreement. Since it would appear from the evidence of independent witnesses called by the defendant and indeed confirmed by the plaintiff's own witness, the Managing Director for Success Projection Sdn Bhd in his letter written to Pengarah Keselamatan Negeri (Appendix C3 to the final report (exh D3) of Mr Kent Teo, that the events of that day were anything but peaceful.

THE WORDS IN EXCEPTION 8(11)

[5] The pertinent words in the said clause which I must consider have been highlighted above and they are mutiny, strike, riot and civil commotion.

[6] Mr Frankie Tieh in his written submission for the plaintiff referred to the Court of Appeal's decision in *Amanah Raya Bhd (suing as administrator of estate of Devia Nathan s/o Savarimuthu, deceased) v Jerneh Insurance Bhd (formerly known as Jerneh Insurance Corp Sdn Bhd)* [2005] 4 MLJ 1; [2005] 2 CLJ 393 where it was held that the onus of proving that a claim covered under the general liability of an insurance policy is within the exclusion or exception clause in the said policy is on the insurer. It is an irrefutable statement of the law and what I would add to that is that the defendant discharges that onus on a balance of probability only. Mr Frankie Tieh went on to diligently defined the meaning of mutiny, strike or riot but from the facts it is obvious that what the villagers was neither in mutiny nor were they on strike, so I would not even consider them. Riot is defined in the Penal Code in s 146 thereof and I agree with Mr Frankie Tieh that it provides a useful guidance in this case and I would reproduce it below:

> 146 Force used by one member in prosecution of common object
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> Whenever force or violence is used by an unlawful assembly or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

[7] Unlawful assembly is earlier defined in s 141 of the same Code as follows:

141 Unlawful assembly

An assembly of five or more persons is designated an 'unlawful assembly', if the common object of the persons composing that assembly is –

(a) to overawe by criminal force, or show of criminal force, the Legislative or Executive Government of Malaysia or any State, or any public servant in the exercise of the lawful power of such public servant.

(b) to resist the execution of any law, or any legal process.

(c) to commit any mischief or criminal trespass, or other offence.

(d) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right, or

(e) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation – An assembly which was not unlawful when it assembled may subsequently become an unlawful assembly.

[8] Civil commotion, Mr Frankie Tieh defined by making reference to an 18th century case of *Langdale v Mason* (1780) 2 Park's Marine Insce 8th ed 965 at pp 967–968 where it was held by Lord Mansfield CJ as follows:

> But what is a civil commotion? It is something else (than rebellion). The present was an insurrection of the people, resisting all law, setting the protection of the government at naught, taking from every man who was the object of their resentment that protection .... The Fleet prison was burnt down; Newgate was burnt down the night before. The King's Bench Prison is burnt and all the prisoners set at liberty. The new Bridewell is burnt; the Bank attached ... Military resistance and an extraordinary stretch were ready made, and justified by necessity. There was a great deal of firing, many men were killed ... What is this but a civil commotion?

[9] The evidence of both the police officer who was Serian's Head of Special Branch, ASP G/14680 Awangku Ahmaddin bin Awang Wang (DW2) and the reporter of a local daily, *Utusan Borneo* Mr Nick Fletcher ak Neha (DW3) who were both present on the day of the riot confirmed that the villagers were armed and aggressive. ASP Awangku Ahmaddin, who came to the scene with twenty of his personnel at about 11am said the villagers were angry because the logging activities of the plaintiff had affected their lives such as destroying their source of drinking water from the mountain. He claimed to have seen the destructive acts of the two hundred to three hundred villagers and the burning of the company's vehicles including the bulldozer in question. He said he tried to stop them but they were very aggressive. Photographs taken by the police of the scene were tendered through him as exh D4C (1–5), D4E (1–12), exh D4G

(1–5) and exh D41 (1–6). He also confirmed being interviewed by a reporter and identified the report of that interview as p 45 of exh D1 which is the defendant's bundle of documents agreed as to authenticity at the trial. I pause here to note that although in cross-examination he said he personally saw the burning of the bulldozer by the villagers, in the report he was quoted as saying that the machineries and workers' quarters were already burnt when he arrived at the scene. Continuing with the ASP's evidence, he said arising from that incident, some villagers were arrested and remanded but not being the investigating officer of the case, he was not sure if any were charged in court under ss 141 or 148 of the Penal Code.

[10] Mr Nick Fletcher, the reporter gave a witness statement and confirmed that the report as stated above which he prepared for *Utusan Borneo* was in Bahasa Malaysia whereas the one tendered in court, from *Borneo Post* was in English and it was not his translation. In his *Utusan Borneo* report, it was titled 'Penduduk Mengamuk Pembalak'. He said he witnessed the torching of the company's vehicles when he arrived at the scene at 10am but could not confirm if the bulldozer was one of them. He confirmed that the police led by ASP Awangku Ahmaddin were present during the torching incident and he did interview the said police officer. He also confirmed that the villagers were armed and aggressive – with parangs, knives and shotguns.

[11] Mr Frankie Tieh highlighted to me the evidence of ASP Awangku Ahmaddin at p 70, lines 12–20 of the notes of proceedings where the witness said as follows:

> Q. Refer to Exhibit D1. In your evidence in chief, there were 200 to 300 aggressive villagers. If you refer to Exhibit D 1, you said the villagers were emotional. So, are the villagers were emotional or aggressive?
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> A. I said they were aggressive because they were armed with parangs, spears and knives and burned the timber camp.
>
> Q. So, you are saying that you disagree to what you said in the newspaper's report on 8.5.2011?
>
> A. *I agree to what is stated I the newspaper's report.*
>
> (Emphasis added.)

[12] He said the discrepancies in the evidence of the police officer and what was quoted from him in the newspaper regarding his arrival after the torching of the vehicles (not before as in his evidence) and the aggression of the villagers not being mentioned in the report means that I should rely on the newspaper report – it being a contemporaneous document and should not therefore believed his oral testimony. The Federal Court case of *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 was cited by him in support of his

proposition above. That citation was of course not misplaced because Chang Min Tat FJ advised that:

> Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[13] Evaluation of evidence, oral, vis a vis contemporaneous documents was similarly stated in the Court of Appeal's case of *Guan Teck Sdn Bhd v Haji Noor bin Haji Yakob & Ors* [2000] 4 MLJ 433 where the evidence presented was conflicting.

[14] However, despite the apparent contradiction of whether ASP Awangku Ahmaddin did witness the burning of the bulldozer and bearing in mind that the burden of proving the said exception clause is on a balance of probability, I am still able to say with confidence, firstly this:

[15] The protest of the villagers on the 8 May 2011 comes neatly within the definitions of both civil commotion and riot as I have outlined above as what happened that day was witnessed by Mr Nick Fletcher and corroborated by his newspaper reporting of same events were driven by the anger of the villagers against the logging activities of the plaintiff. The aftermath of their disgruntled acts were photographed by the police themselves – exh D4B(1)–(5) which show the burnt guard home, exh D4D C(1)–(12), exh D4H(1)–(6) showing the heavy machineries and/or vehicles which were burnt and exh D4F the workers' quarters which have been razed to the ground. I must make a specific mention that a bulldozer is one of the heavy machineries shown in the photographs. The newspaper cutting from *Borneo Post* (exh D1) with the two photographs – of the villagers (some shown with parangs in their hands) and the burning machineries, one of which (at the forefront) look to me as a bulldozer is corroborative of the happenings of that day – it was in other words not some guess work or suspicion but were real. ASP Awangku Ahmaddin in his evidence agreed that the situation on that day was tense and that the police strength of twenty personnel was outnumbered by the estimated two hundred to three hundred villagers some of whom were armed although he admitted that there were also women and children amongst them. Thus, it is my view that in all probability, the torching of the bulldozer was by the same rioting villagers and not some unknown persons as claimed by the plaintiff. This I also say because in their own statement of claim at para 7 thereof the plaintiff itself has pleaded that the bulldozer was on 8 May 2011 'wholly damaged and destroyed by fire when it was placed by the roadside of the logging road under construction at Gunung Meranja, Tebedu, in the District of Serian, Sarawak'. 8 May 2011 was the date of the riot.

[16] I would even venture to add that the torching of the bulldozer by the villagers by the admission above is even beyond reasonable doubt – not just a balance of probability, because it shows that the bulldozer was at the scene of the riot on the very day when the villagers went on a rampage and torched the guard house, the workers' camp and other vehicles of the company.

[17] What is even more damaging to the plaintiff's case is that their own Managing Director, Mr Ho Tian Soo and a witness at the trial (PW4) admitted in his evidence having written a letter dated 3 September 2011 to the State's Director of Internal Security (Pengarah Keselamatan Negeri) marked Appendix C3 to Mr Kent Teo's Second and Final Report (exh D3) and this exhibit I have mentioned earlier, that the villagers 'went on unbridled rampage and were involved in the torching of workers quarters, bulldozers, tractors, logging truck and excavators at the timber camp' (see para 20 of the said letter). Although Mr Frankie Tieh did raise an issue about Mr Kent Teo not being the person who prepared the preliminary report and the first final report (it was his former colleague, one Franklin bin Alau who interviewed Mr Ho Tian Soo), nonetheless the admission made by Mr Ho Tian Soo at the trial that Appendix C was a letter written by him vouched for its authenticity and I would even go so far to say, the content of the said letter. This is because of the writer's authoritative prose which does not admit to any doubt on its content. The plaintiff themselves lodged two police reports on the incident – one by Mr Lung Ee Chiao (PW3) who was its production manager on 9 May 2011 ie a day after the incident and the other by its camp manager, a Mr Chen Teck Soon who according to PW3 saw the smoke emitting from the logging area and who lodged the police report on the day of the incident. His report was in the disputed bundle of documents (marked as Bundle C) and was never tendered as evidence because he was not called by the plaintiff to testify at the trial. Mr Desmond Sahathevan said the failure to call him raises an adverse inference against the plaintiff under s 114(g) of the Evidence Act 1950. I also note that Mr Ho Tian Soo in his letter, Annexure C to Mr Kent Teo's report, mentioned that said report of Mr Chen Teck Soon was lodged immediately after 'the torching incident'. Being the person at the scene immediately prior to the happenings then, Mr Chen Teck Soon would be the best person to confirm that the bulldozer was not part of the plaintiff's heavy machineries torched by the rampaging villagers. Not calling him to testify leaves an impression that calling him would be detrimental to the plaintiff's case and I say this because there was no explanation at all for his absence at the trial and Mr Ho Tian Soo in cross-examination was even unsure if he was employed by his company. Despite this, however, I would not draw that inference for it is trite law that such inference is not simply for failure to adduce a material evidence or call a material witness but a withholding or suppression of that evidence. That is the statement of law made in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 at p 494 and reiterated by the Federal Court in *Siew Yoke Keong v Public Prosecutor* [2013] 3 MLJ 630 at p 660. In this case evidence was not led in

cross-examination if the said Mr Chen Teck Soon was at the time of the trial, still an employee of the plaintiff or whether his whereabouts was known to them then. Therefore, it would not be fair to raise that inference since the evidence of withholding or 'suppression' was not clearly proved.

[18] I have another reason to believe that the bulldozer was part of the vehicles and/or heavy machineries damaged during the rioting and that is the Serian Magistrate court order which returned twelve vehicles to Mr Ho Tian Soo. That court order is part of Annexure C2 to Mr Kent Teo's report and Mr Ho Tian Soo in his cross-examination admitted that he signed the application for the release of the vehicles and/or machineries from police custody and that the bulldozer was listed No 9 in the application No SRN-89–30–11 although he said he was not sure whether all the said twelve vehicles and/or heavy machineries were damaged in a single incident. He agreed however that they were all damaged by fire. It cannot be a coincidence that the police seized the bulldozer together with the other vehicles and/or machineries if it were not part of the plaintiff's properties damaged by the villagers on that day. The only reasonable inference to be made from the evidence is that it was.

[19] Thus, it is on consideration of all these evidence together that I profess the confidence I made earlier. I would, therefore for all the foregoing reasons, answer the first two agreed issues as outlined earlier in the positive.

[20] Having arrive at this conclusion there is no issue of the plaintiff being entitled to the quantum of damages, be it RM798,895 or alternatively, RM730,000 claimed by them. The former figure is the total hire-purchase price for the bulldozer and the latter is its insured sum, both of which were undisputed at the trial for the certificate of insurance (at pp 14–16) was part of the bundle of documents agreed as to authenticity and content (exh P1). Even though the hire-purchase agreement (at pp 11–20) was not part of that exh P1 but exh P2 which is the bundle of documents agreed as to authenticity only, RHB Bank's Senior Business Development Manager, Mr Hii Din Ong (PW1) had identified the said agreement at the trial and he was not cross-examined at all on this evidence.

MARKET VALUE OF THE BULLDOZER

[21] Assuming that I was wrong in my conclusion as the agreed issues above, I would still not award damages in the two sums stated above because under cl 16 of the policy, the parties have agreed as follows:

> 16 MARKET VALUE
>
> It is hereby agreed that in the event of a loss to the property insured herein, the limit of indemnity shall be the *insured value or the market value of the insured property, whichever is the lower,* subject to deduction of any excess and amounts

which the insured is required to bear under the policy.

For the purpose of this condition, the term market value shall mean the value of the property insured herein at the time of damage or loss less due allowance for betterment, wear and tear and/or depreciation.

In the event of a dispute, the market value of the insured property shall for the purpose of this condition be determined by a valuation obtained by the company from the manufacturer, authorized sole agent or agent, authorized broker or authorized distributor of the cost of replacement or reinstatement of the insured property damaged or lost as it was at the time of the occurrence of such loss or damage.

In the event that there is, at the time of damage or loss, no manufacturer, authorized sole agent or authorized broker or authorized distributor for the insured property, the valuation shall be obtained from a Loss Adjuster licensed under the Insurance Act, 1996 and to be mutually appointed by both parties.

The valuation of the insured property by the manufacturer, authorized sole agent or agent, authorized broker or authorized distributor or Loss Adjuster licensed under the Insurance Act, 1996 shall be conclusive evidence in respect of the market value of the insured property in any legal proceedings against the company. (Emphasis added.)

[22] Thus, from the agreement above I would agree with Mr Desmond Sahathevan for the defendant that the plaintiff is not entitled as of right to be paid the insured sum, much less the hire-purchase price. Restitution by way of reimbursement of the hire-purchase instalments is also out of the question because exception 2 of the policy clearly provides that the defendant 'shall not be liable for any consequential loss or legal liability whatsoever'.

[23] Since the bulldozer's market value as defined under the said cl 16 reproduced above was never adduced at the trial and again on the assumption that I was wrong in holding that the defendant is not liable for the loss of the bulldozer, the fair course of action would be to order the learned senior assistant registrar to assess its market value in accordance with the said cl 16.

[24] However, based as the earlier foregoing considerations I would dismiss the plaintiff's claim and I do so with costs of RM40,000 in the absence of the parties agreement to it.

Claim dismissed with costs.

Reported by Afiq Mohamad